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No. 85-1551

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1986

ALAN J. KARCHER, *et al.*,
*Appellants,*

RONALD and CATHERINE SOKALSKI
and TWYLLA FLANDERS,
*Intervenors-Appellants,*

v.

JEFFREY MAY, *et al.*,
*Appellees.*

**On Appeal from the United States Court of Appeals for the Third Circuit**

## REPLY BRIEF OF MOVANTS

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## REPLY BRIEF OF MOVANTS

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1. Appellees do not dispute the two central issues raised by the motion to intervene: whether intervention in the first instance in this Court is appropriate and, if so, whether movants satisfy the standards for intervention in this Court at this time. The motion to intervene demonstrates clearly that the answer to both questions is yes.

Appellees concede that where the "interests of justice" will be served, "this Court clearly has authority to permit a party to intervene in the first instance in this Court." Appellees' Opp. at 5; see R. Stern, E. Gressman and S. Shapiro, *Supreme Court Practice* at 339-40 (6th

ed. 1986). In the present case, Movants clearly meet the requirements of the three-part test for intervention of right in the federal courts, see Motion to Intervene, vi-ix, and should be allowed to intervene to represent their interests. See *Donaldson* v. *United States*, 400 U.S. 517, 528-29 (1971).[1]

Rather than address the intervention issue, Appellees attempt to shift the Court's attention to Movants' "standing." They begin by asking the Court to assume at this time that the named Appellants lack standing to pursue this appeal. Thus, Appellees, who as plaintiffs initiated this action, now seek to avoid review by this Court—and thereby preserve the erroneous judgment below—by challenging the standing of the Defendants/Appellants, against whom they have litigated for four years, and also the standing of the Movants, the real beneficiaries of the statute at issue. The interests of justice are hardly served by the simultaneous argument that 1) the

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[1] Appellees suggest (Opp. at 2 n.2) that intervention might not be appropriate only because the motion to intervene was not timely. However, as Appellees recognize, "timeliness is to be determined from all the circumstances." *NAACP* v. *New York*, 413 U.S. 345, 366 (1973). The issue is not, as Appellees assert, whether Movants have been "aware" of the litigation for any period of time. Appellees' Opp. at 2. On the contrary, the issue, under the appropriate standards for intervention, is whether—at the time of filing—movants have acted timely to protect their interests which are not otherwise "adequately represented." Until the issue of the named Appellants' standing recently was raised, Movants had no reason to believe that their interests would not be adequately represented by the legislature that passed the statute. In addition, the real concern of the timeliness requirement is possible "prejudice" to the parties, but appellees do not even claim that movants' intervention at this time would prejudice them in any way.

Appellees' interpretation of the timeliness requirement would force private beneficiaries of state statutes to intervene at any early stage of any litigation challenging "their" statute in order to guard against the possibility that at some future time the state's representation might become inadequate.

present Appellants lack the requisite personal stake in the outcome and 2) the Court should not permit intervention by others who clearly have such a stake.

2. The issue of the Appellants' standing has been preserved until briefing on the merits. It need not and should not be decided prematurely in this motion to intervene. Moreover, even if the Court were to hold that Appellants lack standing, the Movants possess the necessary interest to defend the statute in this Court and should be allowed to intervene for that purpose. The Appellees have suggested no disadvantage either to the Court or the parties from these Movants' participation as intervenors. Because the premise of Appellees' objection to intervention (the Appellants' standing) will not be decided until briefing on the merits, there is nothing to lose and much to gain from granting the motion to intervene.

The Appellees' wooden and technical claim that Article III does not permit the defense of a legislative act by parties other than the original defendants ignores this Court's precedents. For example, in *Immigration and Naturalization Service* v. *Chadha*, 462 U.S. 919, 935-36 (1983), neither of the named parties—the INS nor Mr. Chadha—defended the constitutionality of the legislative veto provision there at issue. The House and Senate were permitted to intervene for that purpose. See also *Bob Jones University* v. *United States*, 461 U.S. 574 (1983) (*amicus curiae* specially appointed by the Court to argue in support of federal regulation where government refused to defend regulation at issue).

*Diamond* v. *Charles*, 106 S.Ct. 1697 (1986), upon which Appellees place primary reliance, Appellees' Opp. at 3-4, does not stand for the proposition that only the state itself—through its current executive or legislative officers—may defend the constitutionality of a state statute in this Court. *Diamond* instead stands only for the

well-recognized proposition that "a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another." *Diamond*, 106 S.Ct. at 1704. Accordingly, Dr. Diamond was held not to have standing to seek review of the court of appeals' decision enjoining *enforcement* of a criminal statute regulating abortion.[2]

Unlike the Appellant in *Diamond*, Movants do not seek reversal of the ruling below in order to further some intangible interest in promoting their state's criminal laws. On the contrary, Movants Catherine and Ronald Sokalski seek to intervene to support a civil statute that directly protects their fundamental interest as parents in the education and development of their child. Movant Twylla Flanders seeks to intervene in support of her concrete interest embodied in the state statute in using a moment of silence in her classroom as a pedagogical tool.[3] The outcome of this appeal will determine whether Mrs. Flanders will be able to use a moment of silence without being subject to Section 1983 damage claims by

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[2] Other cases cited by the Appellees simply are not on point because they involve instances where there was a flaw in the original action *ab initio* and the court never had a valid claim before it. *United States ex rel. Texas Portland Cement Co.* v. *McCord*, 233 U.S. 157 (1914); *Pusey & Jones Co.* v. *Hanssen*, 261 U.S. 491, 501 (1923). In the instant case, Appellees must concede that there was a valid case and controversy at least until the change in the legislative status of the named Appellants.

Thus, unlike the cases relied upon by Appellees where "the court lacked original subject matter jurisdiction," Appellees' Opp. at 6, the courts below clearly had jurisdiction over this case. If they did not, the judgments below would be void.

Appellees themselves cite the most relevant case, *United States Steel Corp.* v. *EPA*, 614 F.2d 843, 845-46 (3d Cir. 1979). In that case, an intervenor whose "interests . . . were related but not identical to those of the (original party)" was allowed to continue the litigation after the original party was dismissed. *Id.*

[3] Mrs. Flanders has used a moment of silence in the past and, if she is successful in this Court, she will do so in the future.

parents—like the Appellees in this case—who do not want a moment of silence in the schools. Thus, although Mrs. Flanders does not represent the State of New Jersey, she has demonstrated "injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury . . . ." *Chadha*, 462 U.S. at 936 (quoting *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 79 (1978)). In short, the outcome of this litigation will have tangible, concrete effects on the *conduct* of Mrs. Flanders and the Sokalskis (on behalf of their minor daughter).[4] Accordingly, Movants have standing to intervene and protect their own interests and the public interest underlying the statute. *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 476-77 (1940); see L. Tribe, *American Constitutional Law*, 105-106 (1978).

If the Appellants here had prevailed in the court of appeals (so that the statute was upheld) and Appellees had brought the appeal to this Court, the fact that the

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[4] Appellees suggest that there is no "case or controversy" *between* movant Twylla Flanders and the Plaintiffs/Appellees because "[Mrs. Flanders] failed to allege that any of the plaintiffs in this suit are students or parents in the school where she teaches. . . ." This narrow view of the standing doctrine ignores the fact that Appellees sought *statewide* relief barring use of the moment of silence statute. If Appellees can assert their own standing on a statewide basis, they should not be permitted to use the fact that an intervenor resides in a different county to defeat that intervenor's standing.

Moreover, Appellees overlook the fact that Mrs. Flanders seeks to intervene "as an appellant in ~~this matter,~~ on behalf of myself and other public school teachers in New Jersey who support the New Jersey moment of silence statute." Affidavit of Twylla Flanders at 6a. Unless Appellees concede that their own complaint (which was not a class action) was not ripe, they must believe that at least some of the teachers at the relevant schools (which plaintiffs attend) intend to employ a moment of silence statute pursuant to N.J.S.A. 18A:36-4. Mrs. Flanders simply stands in that person's place for purposes of deciding whether there is a case or controversy.

legislative and the executive branches of the State of New Jersey no longer had an interest in defending the law would not require this Court to declare the statute unconstitutional. Certainly in that situation Appellees would not urge, as they do here, that the Court should dismiss the lawsuit for want of a case or controversy. To the contrary, the Court would permit or invite someone to defend the law. See *Bob Jones*, *supra*, at 3; *Chadha*, *supra*, at 3. The result should not be different when the statute has been struck down judicially —but not repealed legislatively—at least when representative individuals for whose benefit the statute was enacted seek to intervene to defend the state's law against the constitutional attack. See L. Tribe at 114 (dismissal for lack of standing "seems appropriate only when the court concludes that there are insurmountable obstacles to identifying the absent but legally relevant interests and securing adequate advocacy of those interests").

The position which Movants espouse is fundamentally fair because it allows the parties with the most direct interest in the statute to defend its constitutionality without interfering with the ordinary political processes. If the current legislature wishes to do so it can repeal the statute at any time and render this litigation moot. In the absence of such action, the statute should remain in effect, if constitutional. Its direct beneficiaries include parents of school aged children and teachers of those children who desire the benefits of a moment of silence. Their interests are personal and concrete and will be lost if the lower court's erroneous decision is permitted to stand. Thus, these Movants not only have a stake in the outcome: according to the Appellees, no other party before the Court who supports the statute has such a stake. Considerations of fairness to the parties affected by the statute, respect for state legislative enactments, and the orderly procedure of this Court all require that the motion to intervene be granted.

## CONCLUSION

For the foregoing reasons and those stated in the motion for leave to intervene, intervenors-appellants' motion for leave to intervene should be granted.

Respectfully submitted,

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